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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIX GONZALEZ,

Defendant and Appellant.

B200657

(Los Angeles County
Super. Ct. No. BA316380)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Rand S. Rubin, Judge. Affirmed.

William L. Heyman for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant and defendant below Felix Gonzales appeals from the judgment entered following a jury trial resulting in his conviction of possession of cocaine base for sale. The issue presented on appeal is whether the prosecution presented sufficient evidence to support the jury's finding that appellant had the specific intent to sell the cocaine base, a requisite element of the charge, and whether the conviction was thereby a violation of appellant's due process rights. Finding evidence presented below sufficient to support the jury's judgment that appellant had the requisite intent, we affirm.

BACKGROUND

Procedural History

Appellant was charged by information on March 1, 2007, with possession of cocaine base for sale in violation of Health and Safety Code section 11351.5. The jury found appellant guilty of possession for sale. After admitting prior convictions in a bifurcated proceeding, the appellant was sentenced to six years in prison, comprising the low term of three years on the substantive offense and a three-year enhancement resulting from the prior convictions pursuant to Health and Safety Code section 11370.2, subd. (a). Appellant filed timely notice of appeal on July 11, 2007.

Summary of the Facts

At approximately 8:30 a.m. on January 29, 2007, Los Angeles Police Officers Scott Alpert and David Hoskins were patrolling the vicinity of Gladys Avenue and Agatha Street in the City of Los Angeles. They saw the appellant on the sidewalk holding a liquor bottle, and stopped him for a search. The search by Officer Alpert revealed a leafy green substance resembling marijuana, a glass pipe, a plastic baggie containing approximately 20 rocks appearing to be cocaine base, and approximately \$120 in currency. Subsequent analysis determined the substance to be 22 rocks containing cocaine base and weighing 5.43 grams.

Officer Alpert confiscated the marijuana, cocaine base, and pipe, but returned the money to appellant. Neither officer counted the total value of the currency in the field.

Before transporting the appellant and two additional suspects detained in relation to the incident, the officers searched the back of the patrol car and found no items or currency. A second search of the patrol car after removing the suspects at the station also revealed no currency. When the appellant was searched in pre-booking, Officer Alpert did not find the currency discovered on appellant's person in the field. However, the arresting officers found currency on the other suspects in an amount and denominations approximately equivalent to those discovered in appellant's possession in the field. The officers had observed the three suspects turning and leaning into one another in the patrol car, and testified at trial that they concluded appellant had managed to pass the missing currency to the other suspects.

Officer Hoskins testified that he had attended specialized narcotics training, testified in court several times on both possession and possession for sale cases, and made several hundred narcotic arrests. He then testified that drug sales in the neighborhood of the arrest were typically of small amounts, paid for with small denomination currency, and that it was not uncommon for sellers in the area to lack pagers, cellular phones, razors, scales, or pay-owe sheets in their business. He further testified that the department used possession of more than eight rocks as a benchmark indication of possession for sale, and that the quantity of cocaine base rocks and currency found in appellant's possession were consistent with street level sales of narcotics. When challenged by defense counsel, Hoskins consistently stated that the presence of a used pipe, consistent with personal use, or the absence of the drug-sale related paraphernalia discussed above did not alter his opinion of appellant's conduct. On questioning by counsel, Hoskins did concede that it was possible for the cocaine rocks to have broken up after being

taken into evidence. Defense counsel argued this fragile nature might explain the number of rocks found in appellant's possession.

DISCUSSION

1. *Standard of Review*

Appellant contends there was insufficient evidence presented to the jury to support a finding that he had the specific intent to sell narcotics at the time of the arrest. Where an appellant challenges the sufficiency of the evidence resulting in an adverse judgment, the court considers whether substantial evidence supports the conclusion of the trier of fact. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Reversal of the decision is warranted only if ““upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment].” [Citations.]’ [Citation.]” (*People v. Parra* (1999) 70 Cal.App.4th 222, 225.) In reviewing the record, the court will construe all evidence in favor of the respondent, and presume every fact reasonably deducible from the evidence in favor of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. *Sufficiency of the Evidence*

Appellant was convicted of possession for sale, which requires a finding that he had the specific intent to sell the cocaine base at issue. (*In re Christopher B.* (1990) 219 Cal.App.3d 455, 466; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1175 “[t]he crime of possession for sale contains the additional element of proof of specific intent to sell the substance”].) The specific intent element can be demonstrated by circumstantial evidence and the reasonable inferences drawn from such evidence. (*People v. Harris* (2000) 83 Cal.App.4th 371, 375; see also *People v. O’Dell* (2007) 153 Cal.App.4th 1569, 1577.) However, as appellant correctly notes, inferences cannot be speculative, and a “finding of fact must be an

inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.” (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 45.)

In the trial below, the primary presentation of evidence against appellant was in the form of expert testimony by Officer Hoskins. Appellant attacks the credibility of Officer Hoskins’ testimony on various fronts by way of imputing that his testimony gave rise to no reasonable inference of the requisite intent to sell. We thereby consider the various elements of Officer Hoskins’ testimony to determine if there was a sufficient basis for the jury’s finding of intent.

A. *Credibility*

We first evaluate the appellant’s claims that Officer Hoskins was inexperienced as an expert witness in possession-for-sale case, and that his opinion should therefore carry “slight weight.” At trial, Officer Hoskins testified to his qualifications and experience dealing with narcotics on the street and testifying at trial. It is established that “‘experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging, and normal use of an individual. [Citations.]’ [Citation.] Thereafter, it is for the jury to credit such opinion or reject it.” (*People v. Harris, supra*, 83 Cal.App.4th at pp. 374-375.) No challenge was made at trial to Officer Hoskins’ qualifications as a witness, nor were objections made to requests for opinions, and the jury was entitled to give due weight to his testimony. (*Ibid.*) This court must decline to reweigh the credibility of his testimony now.

B. *Quantity*

Appellant next argues that even if Officer Hoskins was a qualified expert, this does not establish that his testimony provided sufficient substantial evidence upon which the jury could find requisite intent to possess the cocaine base for sale. Although both arresting officers conceded the amount of cocaine base found could

be possessed for personal use, evidence was also presented that the quantity found in appellant's possession was inconsistent with personal use due to the number of rocks.

As a preliminary argument on this point, appellant offers that the rocks were in a single baggie where they might rub together and break apart. Although this might occur, such an argument was suggested in appellant's closing argument, and the jury could evaluate it in light of the evidence presented. Further, this court notes that appellant was found in possession of 5.43 grams of material containing cocaine base, a significant quantity regardless of the number of rocks. Similar quantities have been found sufficient to indicate possession for sale, and far lesser quantities have been held to be usable. (See *People v. Williams* (1999) 72 Cal.App.4th 1460, 1461 [finding 14 rocks of cocaine base weighing 1.63 grams consistent with possession for sale]; *People v. El* (2002) 102 Cal. App.4th 1047, 1051 ["In support of the possession for sale charge, [the prosecutor] told the jury appellant had been arrested with over six grams of cocaine base and that such an amount was hundreds of times more than that needed for mere personal use"]; see also *People v. Parker* (1992) 8 Cal.App.4th 110, 113, ["Jeanne Spencer, a criminalist, analyzed the substance admitted into evidence . . . and testified the substance weighed .16 grams and contained base cocaine in a usable amount"].)

Appellant analogizes the quantity of rocks in his possession to consumers buying products for personal use in bulk. Such an analogy misses the mark, as the standard of review in this court is whether the conclusion reached by the trier of fact is reasonable, not whether other conclusions are also reasonable. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793, [as long as there is reasonable justification for the findings made by the trier of fact, a reviewing court's opinion that contrary findings might also have been reasonable does not require a reversal]; see also *People v. Thomas* (1992) 2 Cal.4th 489, 514.)

The jury rejected appellant's argument that possession of 5.43 grams of material containing cocaine base was consistent with personal use, and it is not now the province of this court to reevaluate the proffered argument. (See *People v. Culver* (1973) 10 Cal.3d 542, 548 [it is not the function of the appellate court to reweigh the evidence and substitute its judgment for that of the jury].) With these facts in mind, this court cannot say there was no reasonable hypothesis for the jury's finding of possession with intent to sell based on the quantity of material containing cocaine base found in appellant's possession.

C. *Indicia of Possession and Inconsistent Behavior*

Next, appellant argues that even if he possessed quantities sufficient to demonstrate intent to sell, the lack of certain indicia of drug sale behavior is dispositive that the narcotics were for personal use. Appellant notes that the arresting officers did not observe appellant engaging in behavior suggesting intent to sell the cocaine base. By way of illustration, appellant cites to *People v. Douglas* (1987) 193 Cal.App.3d 1691, where the appellant was observed running to a parked car and speaking through the passenger window in a manner consistent with marijuana sales in the area. Such a comparison is not useful in this case, as it conflates the elements of possession with intent to sell and attempted sale. (See Health & Saf. Code § 11351.5; cf. Health & Saf. Code § 11355.) Appellant goes on to claim that, if he had been observed selling or attempting to sell the cocaine base, the conviction of possession for sale would be "understandable" for the amount remaining in his possession. This claim implies that intent follows from and requires the act of sale. The act proscribed by section 11351.5 is possession for sale, not sale itself, and no direct, unequivocal acts towards a sale are necessary elements. (Cf. *People v. Encerti* (1982) 130 Cal.App.3d 791, 800 [stating no actual sale is required when the proscribed act is offer to sell].) Possession of 22 rocks of material containing cocaine base, totaling 5.43 grams, was enough without further activity to establish intent to sell. While an attempt to

sell would unequivocally establish appellant's intent to possess for sale, it is not a prerequisite thereof.

Appellant additionally asserts the absence of various paraphernalia disprove the presence of intent. Specifically, appellant notes that he was not found in possession of a scale, razor, cell phone, pager, or small baggies, and that he was found with a pipe indicative of personal use. However, these were not necessary elements of the offense, either. Officer Hoskins testified their absence did not impact his opinion, that it is not uncommon for sellers to use their own product, and that the presence of a pipe did not change his opinion. The jury, presented with the testimony of Officer Hoskins, rejected the argument that the absent indicia disproved the charge of possession for sale. It is not the province of the court to reweigh the determination of the trier of fact. (See *People v. Culver*, *supra*, 10 Cal.3d at p. 548.)

D. *Currency*

Appellant notes that substantial time at trial was spent discussing his movements in the back of the patrol car after Officers Hoskins and Alpert arrested him. Under the preceding analysis, such concerns are relatively moot, but are discussed briefly. Appellant is correct in that, taken alone, the quantity of currency and the attempt to transfer the currency to the other suspects, may be insufficient to sustain a finding of intent to possess for sale. But as circumstantial evidence, the behavior can be interpreted as indicative of consciousness of guilt, and can thereby support the jury's finding that appellant had the requisite intent to sell. If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the appellant will not warrant interference with the determination of the jury. (*People v. Daugherty* (1953) 40 Cal.2d 876, 885.)

3. *Due Process*

Because evidence in the case below was sufficient to sustain a finding that appellant had the requisite intent to possess for sale material containing cocaine base, the due process concern raised in appellant's brief is moot.

DISPOSITION

Construing the facts under the mandatory rules of appellate review, we conclude that that jury's finding of possession for sale of cocaine base was sufficiently supported by the evidence presented at trial. The judgment is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.